75-1599

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. A836

ARNOLD ZAGER, JACK ZAGER, and MORRIS ZAGER, Individually and Co-Partners, doing Business as Morris Zager Bakery, Morris Zager Delicacies and Zager All Food Service,

Petitioners,

v.

W. J. USERY, JR., Secretary of Labor,
Respondent

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Sixth Circuit

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May, 1976.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals For the Sixth Circuit

Petitioners, Arnold Zager, Jack Zager, and Morris Zager, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on December 23, 1975.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, printed in the Appendix attached hereto, has not been officially reported (Appendix B). The Findings of Fact and Con-

clusions of Law of the District Court is printed in the Appendix attached hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1975. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254 (1).

STATEMENT

The Petitioners herein own and operate in the city of Nashville, Tennessee, a number of enterprises. These businesses consist of Morris Zager Restaurant and Delicatessen, which is engaged in the retail sale of prepared sandwiches, bakery items, health foods and delicacies, including a number of imported foods, as well as the normal miscellany of products sold by a restaurant and delicatessen (JA 43); Food Delicacies, which is a wholesale food distributor engaged in sales of products (principally yogurt) to retail establishments (JA 54); a bakery where bakery products are made and sold at both wholesale and retail (JA 42); and a leased bakery department in a Kroger store, where bakery products are sold at retail to the general public (JA 42). The restaurant is located on Sixth Avenue. Food Delicacies operates an office and segregated facilities in the Sixth Avenue building. The bakery from which wholesale and retail sales are made is located on West End Avenue, some miles from Sixth Avenue. The leased bakery department is housed on Gallatin Road, miles from both Sixth Avenue and West End Avenue. There are no interchange of employees between the operations except that all of the businesses are owned by the Petitioners, one bookkeeper keeps the books for all of the businesses, and a delivery man employed by Food Delicacies occasionally makes deliveries for the restaurant. A central

office is located in the Sixth Avenue building where separate books and records are maintained for each business (JA 52).

An investigation by the U. S. Department of Labor of the Petitioners' operations was made in 1972 (JA 286). The Department of Labor concluded, among other things, that the Petitioners' bakery employees on West End Avenue and truck drivers were paid for scheduled hours of work which exceeded actual hours of work (JA 286) and a number of waitresses employed by the restaurant were not "tipped employes," that is, their tips were not sufficient to be applied against the minimum wage (JA 287). The Department of Labor also determined that the Petitioners' restaurant, combined with other income, did a volume in excess of $250,000.00, thereby making its employees subject to the minimum wage and overtime requirements of the Act, unless otherwise exempted, despite the fact that an investigation made by the U. S. Department of Labor in 1971 revealed no such finding and Petitioners were led to believe that their restaurant operations were separate and in full compliance with the law.

The U. S. Department of Labor filed suit in the District Court in Nashville, on April 12, 1976 (JA 1), and the Court's Findings of Fact and Conclusions of Law were filed on October 23, 1976, and March 12, 1975, (JA 10, 21), and its Judgment entered April 1, 1975 (JA 33), The Petitioners' Notice of Appeal was filed on April 30, 1975 (JA 39), and the Court of Appeals decision issued on December 23, 1975.

QUESTIONS PRESENTED

(1) Whether the Petitioners' restaurant located at 221 Sixth Avenue, Nashville, Tennessee, meets the "re-

tail establishment" tests as set out in Section 13(a) (2) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, et seq.) hereinafter referred to as the Act?

(2) Whether the Petitioners' employees employed as waitresses at its Sixth Avenue restaurant constituted "tipped employees", within the meaning of Section 203(t) of the Act (29 U.S.C. 203t)?

(3) Whether the Petitioners unlawfully discharged Mary Hall in violation of Section 215 (a) (3) of the Act?

(4) Whether the Petitioners "suffered or permitted" Louise Overton to work in their bakery located on West End Avenue within the meaning of Section 203(g) of the act.

(5) Whether the Petitioners violated the minimum wage and overtime provisions of Sections (6) and (7) of the Act in payment of its bakery employees?

(6) Whether the Petitioners were allowed by Respondent the reasonable cost of meals as part of the employees wages (29 U.S.C. 203 m)?

(7) Whether the Petitioners willfully violated the provisions of the Act, subjecting it to the three-year liability provision of the Portal-Portal Act of 1947 (29 U.S.C. 255)?

REASONS FOR GRANTING THE WRIT

The instant case is one where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals and in addition has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I. The Court of Appeals affirmed the District Court's finding that the Petitioners' restaurant did not qualify as an exempt retail or service establishment. Section 13(a) (2) of the Act exempts from the minimum wage and overtime provisions "any employee employed by any retail or service establishment . . . if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not in an enterprise described in Section 3(s) or such establishment has an annual dollar volume of sales which is less than $250,000.00 (exclusive of excise taxes at the retail level which are separately stated). A retail or service establishment shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." There is no doubt that more than 50% of the restaurant's sales are made in Nashville and that more than 75% of its sales are recognized as retail sales in its industry. The question for determination is whether the restaurant's yearly sales exceeded the $250,000.00 tolerance.

The weight of the evidence clearly delineates that the yearly volume of the restaurant never exceeded $250,000.00 (JA 14). In 1969, the total volume was $216,731.56 (JA 421); 1970, $223,507.60 (JA 420); 1971, $229,446.62; and 1972, $223,600.10. These were gross figures without the allowable tax deductions. Even the Department of Labor's compilation of the restaurant's volume of sales with allowable tax deduction was $208,416.00 for 1969; $224,156.00 for 1970; $219,987.00 for 1971, and $213,719.00 for 1972 (JA 416). What the Department of Labor did, however, in order to increase the restaurant's volume, was to determine that the res-

taurant and Food Delicacies were a single establishment. Even adding, moreover, Food Delicacies annual volume of $24,973.92; $18,665.67; $21,465.52; and $28,082.25 for 1969, 1970, 1971 and 1972, (JA. 418-421), to those annual figures of the restaurant as computed by the Department of Labor, the volume of the restaurant still did not exceed $250,000.00 for the years involved. Consequently, the Department of Labor had to proceed further and include in the volume extraneous Petitioners' transactions of Scottish Rite and miscellaneous bakery delivery, which transactions are in no way sales within the meaning of the Act.

The word "sale" in the Act is defined to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." Neither the Scottish Rite or miscellaneous bakery delivery fall into that category. The Scottish Rite transactions occur once or twice a year wherein merchandise is ordered for Scottish Rite as Petitioners' civic duty. The merchandise is delivered to Scottish Rite and Scottish Rite is billed by Petitioners for the exact amount of charges for the merchandise. Petitioners order the merchandise for Scottish Rite in order to get lowest wholesale price (JA. 59). To hold this accomodation a "sale" is a complete departure from the intent of the Act. Miscellaneous bakery delivery also does not constitute a sale within the meaning of the Act, as these transactions occur only when Petitioners split railroad car of flour with another bakery and is reimbursed (JA 61).

The applicable law is clear that the Petitioners' restaurant constitutes an establishment by itself. The Department of Labor's Interpretative Bulletin, Part 779, states as follows in Section 779.303:

> "The terms "establishment" however is not synonymous with the words "business" or "enterprise" when those terms are used to describe Multi-Unit operations. In such a Multi-Unit operation some of the establishments may qualify for exemption, others may not. For example, a manufacturer may operate a plant for production of its goods, a separate warehouse for storage and distribution, and several stores from which its products are sold. Each such physically separate place of business is a separate establishment.

Section 779-305 of the Bulletin clearly states that "the retail portion of an establishment would be considered a separate establishment from the unrelated portion for the purposes of the exemption if (a) it is physically separated from the other activities; and (b) it is functionally operated as a separate unit having separate records and separate bookkeeping; and (c) there is no interchange of employees between the units." The Section further states that the requirement that there be no interchange of employees between the units does not mean that an employee in one unit may not occasionally, when circumstancese require it, render some help in the other Units or that one employee of one Unit may not be transferred to work in the other Unit. Such is the case with the Petitioners' restaurant.

The case of **Wirtz v. Modern Builders, Inc.**, 288 F. Supp. 338 (1968), supports the Petitioners' position. In that case, there was a building materials business together with a general contracting business both owned by the same corporation. Both businesses occupied the same building with the building materials business taking almost all of the building and the construction business occupying an office in the building separated by a partition and door from which the construction business was carried on. A single bookkeeper worked for both businesses, and a truck driver for the building materials

business swept up the store and office each morning. The business records of the two operations were separate, including time and sales records. Both had separate bank accounts. The Court found that the building materials store and the construction business should be regarded as two separate establishments. See also **Johnson v. Meyers Brothers Parking System,** D.C. Ga. (1971), 20 WH 507, affirmed (CA5 (1972) 20 WH 713). **Hodgson v. Brand Names, Inc.,** 452 F. 2d 384 (C.A.J., 1971). This is the case at bar. The restaurant is fully segregated and has its own employees and books, and thus constitutes a separate establishment.

II. Section 203(m) of the Act allows employers to take a partial credit against the minimum wage they are required to pay for amounts presumably received in tips by their tipped employees. Section 203 (t) of the Act defines a tipped employee as "any employee engaged in an occupation in which he customarily and regularly receives more than $20.00 a month in tips". Section 203 (m) provides that in determining the wage of a tipped employee, the amount paid shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per cent of the applicable minimum wage.

The statute leaves the initial determination as to the amount of tips being received to the employer but permits an employee who feels he is being shortchanged to seek a redetermination by the Secretary of Labor. Once the employee establishes to the satisfaction of the Secretary that the amount he is actually earning in tips is less than the amount the employer is taking credit for, then the employer is liable to the employee for the difference, and only this lesser amount may be added to the cash wages being paid the employee to determine

whether the employer is meeting the minimum wage requirements of the FLSA.

In the instant case the Court of Appeals affirmed the District Court's decision that the restaurant's waitresses were not tipped employees, as they did not make in tips more than $20.00 a month and so stated to the Petitioners on tip slips. Evidence cannot support the District Court's finding. Despite the testimony of a number of waitresses that they never received more than $20.00 a month in tips, there is monumental evidence to negate this. Firstly, former employee Daphne Lynch testified without contradiction that the waitresses called the tip slips "liar slips" (JA 332); secondly, two waitresses (one who had been employed for some years and one who was new) testified that they exceeded the $20.00 tolerance, employee Lucille Foster stating that she made $8.00 to $10.00 a day in tips (JA 259), and former employee Janice Ford, who only worked for three weeks stated that she made as high as $15.00 a day in tips (JA 255); thirdly, the Petitioners' restaurant is a fast food operation with an average, individual check of $2.50 and a minimum tip of twenty five cents (JA 348), and even a new waitress would wait on approximately 50 customers during a lunch rush hour (JA 346), with the older waitresses waiting on over 100 customers during the same period of time (JA 347); and fourthly, a number of Petitioners' regular customers testified without contradiction of the large number of customers in Petitioners' restaurant and average amount of the checks (JA 309-330).

This clear cogent evidence was completely ignored, and based upon it, all waitresses should have been considered "tipped employees" within the meaning of the Act. **Brennan v. National Hotel Co.,** 476 F 2d 17 (C.A. 5, 1973)

III. Section 215(a) (3) of the Act declares that "it shall be unlawful for any person to discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee".

The District Court found that the Petitioners discharged employee Mary Hall in violation of Section 215(a) (3) of the Act, and ordered back wages paid to her. There is no evidence that Hall was discharged by the Petitioners. While Hall did testify that Petitioner Jack Zager told her he wanted the check given to her as a result of an agreed settlement with the Department of Labor "or else" she did not testify that Zager discharged her or told her that she was discharged if she did not return the money (JA 240). Hall testified that by Zager's remarks *she took it to mean* that if she did not return the money she was not to come back, although on cross-examination she admitted that she at no time asked Zager if she was discharged or about to be discharged (JA 244). Zager, on his part, specifically denied that he told her to return the money or else (JA 385). Zager, upon advice of his attorney, told each employee who was paid money, as a result of that investigation, that the Company did not feel that it owed the employees anything, but that the Company was making payment to resolve the matter with the Department of Labor. Zager further testified that after several employees wanted to return the monies he again consulted with his attorney who told him under no circumstances to accept the money and tell the employees to donate the money to their favorite charity if they did not want it (JA 383). This corroborated by the testimony of attorney Carmack Cochran (JA 369). This information,

Zager stated, he imparted to the employees who wanted to return the monies. There is absolutely no evidence to the fact that Zager even indicated to any other employee that they were to be discharged if they did not return the money, and it is unrealistic to assume that Zager would have discharged only Hall. Zager's testimony with respect to Hall was that after having received payment she did not return to work, and that she sent the keys to the bakery to Zager several days later with another employee (JA 386). Certainly had Hall been under the impression that she was being discharged, she would have left the keys at the time she left the Company's premises. It is submitted that there is no proof that the Petitioners discriminatorily discharged Hall. Hall's own testimony also fails to substantiate such conclusion.

IV. The District Court found that the Petitioners "suffered or permitted" Louise Overton to work in its bakery.

Louise Overton was the wife of Joe Overton, a baker who was employed by the Petitioners' bakery located on West End Avenue. Louise Overton apparently worked at the bakery during a five week period of time when her husband had a broken arm (JA179, 180). Joe Overton's hours were late at night under no supervision, and Petitioners were not aware Louise Overton was working, nor did they authorize such work (JA 334).

In **Walling v. Portland Terminal Co.**, 330 U.S. 1486 (1947), it was recognized that one may work on the premises of another for his own advantage without coming under the definition "suffer or permit to work". This case involved independent contractors and established a test which should be applied in this case. Did Louise Overton perform the work on Petitioners' premises for

her own advantage? She worked only to assist her husband and her purpose was not to assist the Petitioner. Under the facts of the instant case she was not suffered or permitted to work within the meaning of the Act. **Shultz v. Mountain Broadcasting Service, Inc.**, 20 WJ 1239 (D.C., 1973).

V. The District Court found that the Petitioners violated the minimum wage and overtime provisions of the Act with respect to payment of its employees employed at the bakery on West End Avenue (JA 31), in that they never worked as many hours as they recorded on the time clock. The record does not support this conclusion.

The evidence is clear that after a 1971 investigation of Petitioners' operation in which the U. S. Department of Labor determined that the bakery employees were within the purview of the Act, Petitioner Jack Zager, who managed the bakery, spoke to each and every bakery employee, set out a scheduled work week for each employee on an hourly rate which in all cases was in excess of the minimum rate required by the Act (JA 379). Zager testified that he advised each employee of his scheduled work week and his wage rate, to keep his time correctly, and that in order for him to receive his maximum pay he must work all of his scheduled hours (JA 379).Zager further stated that then the employee would be paid on the basis of the number of hours worked. As the bakery employees generally worked odd hours without supervision, there was no way Petitioners could tell the number hours worked by the bakery employees except by the time card each employee kept. Petitioners could only assume that the hours the employee clocked were correct (JA 391). Zager specifically denied that he told any employee to record incorrect hours, and it would be folly to assume that Zager would

advise any employee to record more hours than he actually worked (JA 391). It can only be argued that the Petitioners owe no back wages to the bakery employees because said employees kept their own time and submitted those hours to the Petitioners for payment.

It should also be noted that for those two employees who testified that they worked more hours than for which they were paid, Michael Kemp and Mary Hall, the record is replete with contradictory evidence from the Government's own witnesses that they did not work the hours they claimed. For example, Mary Hall testified that she worked at the bakery in the morning often from 6:30 A.M. until 10:30 or 11:00, while the testimony of Michael Kemp was that on most mornings he took Hall to the restaurant around 8:30 A.M. (JA 220). Kemp also testified that he was at work each morning at 6:45 A.M., and employee Grant Stevenson testified that because Kemp was always late, orders were always behind (JA 204). Consequently, it is submitted that those bakery employees who testified did so only for the exigencies of the situation rather than for truth of matters.

VI. The law is clear that wages includes the reasonable cost of meals furnished to employees.

The District Court found that the Department of Labor's allowance of $.52 per meal to waitresses was correct. It is submitted that the Court's decision was incorect. Title 29, Part 531, Subpart B of the Department's regulations defines reasonable cost as not more than the actual cost to the employer and does not include a profit to the employer or to any affiliate person. The uncontradicted testimony of Petitioners and restaurant manager Arnold Zager as to the cost of the meals given was approximately $1.00 in 1969 and 1970,

and $1.50 in 1971, 1972, 1973 (JA 351). The determination of $.52 per meal purportedly made by Government investigator Lindsay was taken from operations dissimilar from that of Petitioners and cannot be considered as the reasonable cost as set out in Section 203(m) of the Act and Government's Regulations Title 29, Part 531, Section 531.3.

VII. The record does not substantiate that the violations were willful, as the Petitioners without question were notified after the 1971 investigation that their restaurant operation was exempt from the Act as a retail establishment (JA 342). Clearly the evidence does not show that any violations were intentional, knowing or voluntary. See **Mayhue's Super Liquor Stores, Inc. v. Hodgson**, 413 F. 2d 658 (C.A.4, 1969).

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed October 23, 1973)

This cause came on for trial before the Court, sitting without a jury, on August 31, 1973, upon the complaint filed by the Secretary of Labor under section 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, *et seq.*), hereinafter referred to as the Act. The complaint seeks to enjoin the defendants from violating the provisions of section 15(a)(2), 15(a)(3) and 15(a)(5) of the Act, and to restrain the further withholding of payment of minimum wages and overtime compensation due to defendants' employees under the Act. By prior order of the Court, the trial on August 31, 1973, was limited to the issues of: 1) whether defendants' business activities were covered by the Act; and if so (2) whether they were exempt from the monetary provisions of the Act under section 13(a)(2) thereof. Remaining issues are being held in abeyance pending disposition of the aforesaid coverage and exemption issues.

It having been made to appear during the course of proceedings on August 31, 1973, that defendant Morris Zager was not actively engaged in operation of any part of the business during the period of time involved in this action and for good cause shown the complaint as to Morris Zager was dismissed by the Court on that date.

The Court having considered the pleadings, exhibits, testimony of witnesses, statements of counsel and the briefs, and being fully advised in the premises hereby makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Defendants, Arnold Zager and Jack Zager, reside in Nashville, Davidson County, Tennessee. Throughout the period since February 24, 1969, Arnold Zager and Jack Zager have been

owners, equal partners and active managers of a business carried on variously under the names Morris Zager Restaurant and Delicatessen, Morris Zager Delicacies, Zager All Food Service, Food Delicacies Distributors and Morris Zager Bakery, which business includes operation of a restaurant-delicatessen and wholesale food distributorship located on Sixth Avenue, North; a bakery on West End Avenue; and a bakery goods leased department in a Kroger supermarket on Gallatin Road, all in Nashville.

2. At their restaurant-delicatessen defendants sell food and beverages to the general public, and carry on a food catering service. From the same location defendants operate a wholesale food distributorship under the name Food Delicacies Distributors selling primarily specialized food items to supermarkets and restaurants for resale. Also from this location defendants occasionally order for and sell to the Scottish Rite Masonic Temple in Nashville food items such as meats, canned goods, bread, cakes and pastries, many of which items are drop shipped directly from the supplier to the Temple.

3. At Morris Zager Bakery defendants produce baked goods which they sell both at wholesale and at retail. Wholesale sales and deliveries are made from the bakery to grocery stores, supermarkets and restaurants; retail sales are made from the bakery display shop, the restaurant-delicatessen and the Kroger leased department.

4. Defendants maintain a central office at their Sixth Avenue, North location from which they manage and coordinate all phases of their business. They regularly—almost every week—purchase and receive goods and supplies from out-of-state sources. In addition they regularly purchase and receive from local suppliers a substantial volume of goods which have moved in interstate commerce. Defendants' employees order, receive, handle, work on and sell such goods.

5. The business activities of defendants are closely integrated,

operating under common ownership and control. The same employee and delivery equipment are used to make wholesale deliveries of bakery products and specialized foods sold by defendants under the name Morris Zager Bakery and Food Delicacies Distributors, and to transport baked goods from the bakery to defendants' own restaurant-delicatessen and their Kroger leased department. The cost of such delivery operations for accounting purposes is charged entirely to the Morris Zager Bakery operation. Moreover, no accounting charge or bookkeeping entry is made with respect to the substantial quantities of bread, rolls, pastries and other baked goods supplied from defendants' bakery to their delicatessen-restaurant operation for sale to patrons of the latter, including the catering service, and accommodation sales to Masonic Temple.

Substantially all food products, supplies and ingredients used by defendants in their various business activities are centrally ordered to take advantage of bulk purchase discounts and lower freight charges. Except for those supplies and ingredients used in the bakery operation, such products are stored at the Sixth Avenue, North location. The same bookkeeper employee at the latter location keeps all business records, which are functionally integrated even though some sales journals are kept with respect to sales from the bakery and wholesale sales under the name Food Delicacies Distributors.

All defendants' employees, regardless of place of employment or principal activity, are covered under the same accident and health benefits policy, the same group life insurance policy and the same workmen's compensation policy. All operating expenses, including employees' salaries, of defendants' various business activities are paid from a single bank expense account. Defendants advertise and hold themselves out to the public as an integrated, multifaceted business enterprise.

6. At the trial defendants asserted that during the period

since February 24, 1969, their total annual dollar volume of sales was as follows, derived from their various business activities as indicated:

Activities	1969	1970	1971	1972
Morris Zager Restaurant and Delicatessen	$216,731	233,507	229,446	223,600
Kroger	34,343	39,294	33,943	36,958
West End	59,367	57,353	57,161	59,225
Food Delicacies Distributors	24,973	18,665	21,465	28,082
Scottish Rite	——	6,000	6,719	8,847
Cash Bakery Route Sales	——	6,852	7,977	9,209
Miscellaneous Bakery Delivery	——	31,396	8,244	29,797

Defendants produced records supporting their claimed sales from the bakery (West End); bakery leased department (Kroger); cash bakery route sales; and the restaurant-delicatessen, as well as sales under the name Food Delicacies Distributors, but no records to support sales designated as miscellaneous bakery delivery. Furthermore, defendant Arnold Zager's attempted explanation of the receipts from "miscellaneous bakery delivery" was vague, unsatisfactory and unconvincing, particularly in the absence of supporting records. However, it appears and the Court accepts as established that proceeds from disposition of split bulk orders of flour, shortening, etc., to other business establishments and sales of equipment, etc., were included in this category, such sales transactions having been handled from defendants' office on Sixth Avenue, North.

7. On the other hand, Paul Lindsey, Department of Labor Compliance Officer, testified positively that Arnold Zager told him, during the Wage-Hour investigation, that all sales were

generated by the bakery, bakery leased department, restaurant-delicatessen and wholesale food distributorship, including sales to the Masonic Temple, as follows:

Activity	1969	1970	1971	1972
Bakery	$ 59,368	57,353	57,163	59,256
Leased Department	31,221	33,886	33,937	——
Restaurant-Delicatessen (after sales tax deductions)	208,416	224,156	219,987	213,719
Food Delicacies Distributors (*including sales to Masonic Temple)	66,974*	71,464*	43,572*	31,127

Compliance Officer Lindsey has previously testified in other cases before this Court, his credibility has never been impeached, and his testimony given in this case is specifically found to be credible.

8. The annual receipts from sales reflected by the bakery sales journal during the period in question, were as follows:

Year	Annual Dollar Volume	Resale	Percent Non-Retail
1969	$59,368	19,745	33
1970	57,353	17,604	30.6
1971	57,163	17,922	31
1972	59,256	23,992	40

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter involved herein and is empowered to grant the relief sought by the plaintiff.

2. Coverage provisions of the Act are to be given a liberal construction, consonant with the definitions, with the purposes of the Act, and with its character as remedial and humanitarian legislation. **McComb v. Farmers Reservoir & Irrigation Co.,** 167 F.2d 911 (C.A. 10); aff'd. with modifications not relevant here, 337 U.S. 755; **Mitchell v. Lublin, McGaughey & Associates**, 358 U.S. 207; **Mitchell v. Vollmer,** 349 U.S. 427; **Powell v. U. S. Cartridge Co.,** 339 U.S. 497.

3. Defendants Arnold Zager and Jack Zager are employers within the meaning of section 3(d) of the Act. **Hodgson v. Frisch Dixie, Inc. et al.,** 66 LC ¶ 32,557 (W.D. Ky., 1971); aff'd. 469 F.2d 83 (C.A. 6); **Wirtz v. Fortuna Broom Co.,** 53 LC ¶ 31,785; aff'd. 379 F.2d 327 (C.A. 5); **Wirtz v. Malthor, Inc.,** 391 F.2d 1 (C.A. 9); **Chambers Construction Co. v. Mitchell,** 233 F.2d 717 (C.A. 8).

4. All business activities of the defendants, as described above, are related and they are performed through unified operation or common control for a common business purpose and comprise an "enterprise" as defined in section 3(r) of the Act. **Wirtz v. Columbian Mutual Life Ins. Co.,** 380 F.2d 903 (C.A. 6); **Wirtz v. Allen Green & Associates,** 379 F.2d 198 (C.A. 6); **Hodgson v. Frisch Dixie, Inc., et al.,** *supra.*

5. Defendants' employees who regularly order, receive, handle and otherwise work on out-of-state food products and other goods and supplies and keep the books and records pertaining thereto, are engaged in commerce or in the production of goods for commerce as those terms are defined in the Act. **Walling v. Jacksonville Paper Co.,** 317 U.S. 564; **McComb v. Wright,** 168

F.2d 40 (C.A. 6). Defendants have employees who regularly handle, sell or otherwise work on goods which have been moved in or produced for commerce by other persons and this without more provides a sufficient basis for enterprise coverage since section 3(s) extends coverage to enterprises which may not purchase goods directly from outside the state but which do have employees who handle "goods that have been moved in or produced for commerce by any person," i.e., goods which have moved in interstate commerce but which have "come to rest" within the state prior to delivery to the employees involved. **Hodgson v. Frisch Dixie, Inc., et al.,** *supra*; **Wirtz v. Melis Construction Co.,** 408 F.2d 626 (C.A. 2).

6. The aforesaid business activities have an annual dollar volume in excess of $250,000 and, therefore, constitute a covered enterprise as described in section 3(s)(1) of the Act.

7. The exemptions in section 13 of the Act (29 U.S.C. 213) are to be narrowly construed with respect to an employer seeking to assert them and their application is limited to those who come plainly and unmistakably within their terms and spirit. **Arnold v. Ben Kanowsky, Inc.,** 361 U.S. 388; **Mitchell v. Kentucky Finance Co.,** 359 U.S. 290. "Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." **A. H. Phillips, Inc. v. Walling,** 324 U.S. 490.

8. Although the Court is of the opinion that the bakery and bakery leased department, in conjunction with the activities conducted at the Sixth Avenue, North location, comprise one, single, integrated business establishment, it is not necessary to reach this question in order to decide the issue before the Court. The Court does, however, find and conclude that all business activities conducted in and from defendants' building located at Sixth Avenue, North are highly integrated, both physically

and functionally, and comprise a single business establishment with an annual dollar volume of sales in excess of $250,000. **Wirtz v. Columbian Mutual Life Ins. Co.,** *supra*; **Mitchell v. Gammill,** 245 F.2d 207 (C.A. 5); **Mitchell v. T. F. Taylor Fertilizer Works,** 233 F.2d 284 (C.A. 5). The Sixth Avenue, North establishment, therefore, is not a "retail or service establishment" within the meaning of section 13(a)(2) of the Act.

9. In excess of 25% of the sales of the bakery are sales for resale. For that reason the bakery operation, if considered separately, would not qualify as a "retail or service establishment" within the meaning of section 13(a)(2) of the Act.

10. Defendants have failed to carry the burden of proving that their employees are exempt from the minimum wage and overtime provisions of the Act under section 13(a)(2) thereof. See **Idaho Sheet Metal Works, Inc. v. Wirtz,** 383 U.S. 190; reh. den. 383 U.S. 963; **Mitchell v. Kentucky Finance Co.,** 359 U.S. 290.

/s/ L. CLURE MORTON
United States District Judge

ORDER

(Entered November 7, 1973)

The Court having entered Findings of Fact and Conclusions of Law on October 26, 1973, which are incorporated by reference, it is hereby

Ordered, Adjudged and Decreed that the defendants Arnold Zager and Jack Zager, Individually and as Co-Partners, Doing Business as Morris Zager Bakery, Morris Zager Delicacies and Zager All Food Service, are and have been at all times since

February 24, 1969, covered by the provisions of the Fair Labor Standards Act (29 U.S.C. 201, et seq.), and not exempt from the provisions of said Act under section 13(a)(2) thereof.

It is further Ordered that the complaint be dismissed as to the defendant, Morris Zager.

Upon the remaining issues, it is Ordered that the matter be set for trial on the 5th day of June, 1974.

/s/ L. CLURE MORTON
United States District Judge

Approved for Entry:

s/ MARVIN TINCHER
MARVIN TINCHER
Regional Attorney

s/ RALPH D. YORK
RALPH D. YORK
Trial Attorney

MEMORANDUM

(Filed March 12, 1975)

This cause came on for trial before the court, sitting without a jury, on June 5, 6 and 7, 1974, upon the complaint filed by the Secretary of Labor under Section 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201, *et seq.*), hereinafter referred to as the Act. The complaint seeks to enjoin the defendants from violating the provisions of §§ 15(a)(2), 15(a)(3), and 15(a)(5) of the Act, and to restrain the further withholding of payment of minimum wages and overtime compensation due to defendants' employees under the Act. Following a prior trial in this matter on August 31, 1973, limited to the issues of coverage and exemption, this court found and concluded that defendants' business activities were covered by the Act and were not exempt from its monetary provisions under § 13(a)(2) thereof.[1]

The remaining issues, i.e. whether defendants have violated the minimum wage, overtime, discriminatory discharge and recordkeeping provisions of the Act, and if so, the extent of such alleged violations, are resolved hereinbelow.

The court, having considered the pleadings, exhibits, testimony of witnesses, statements of counsel and briefs, and being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law on the said remaining issues.

Findings of Fact

(1) A prior investigation of defendants' business activities in February, 1971, disclosed that defendants' bakery was covered

[1] Findings of Fact and Conclusions of Law entered October 16, 1973.

and not an exempt retail establishment under § 13(a)(2) of the Act since in excess of 25% of its sales were for resale. This same investigation resulted in a finding by the Compliance Officer that the defendants' restaurant establishment was an exempt retail establishment under § 13(a)(2) of the Act, since its annual dollar volume of sales was apparently less than $250,-00. However, the most recent investigation of defendants' business disclosed that the restaurant establishment in fact had an annual dollar volume of sales in excess of $250,000 since at least 1969, and therefore, defendants were not entitled to the said exemption for their restaurant.

(2) During the aforesaid prior investigation, back wages resulting from minimum wage and overtime deficiencies were alleged by the plaintiff to be due certain of the bakery establishment's employees and were computed for the period from February 21, 1969, to February 21, 1971. Negotiations by and between counsel for defendants and Labor Department attorneys resulted in an agreed settlement the latter part of 1971, with a cut-off date of October 31, 1971, for application of the two-year statute of limitations contained in the Portal-to-Portal Act of 1947 (29 U.S.C. § 225). Back wages due employees were reduced by amounts which accrued and became due prior to October 31, 1969, such amounts having been tolled by the said statute. Although there was some dispute among the parties regarding the period of time covered by the back wages settlement, the objective evidence reflects that only the period of time prior to February 22, 1971, was covered.

(3) No back wages were alleged to be due employees of the restaurant establishment during the prior investigation in February, 1971, because it was considered to be an exempt retail establishment at that time based on sales information made available by defendants to representatives of the plaintiff.

(4) During the period since February 21, 1971, the number of hours worked by defendants' bakery employees fluctuated

from one week to the next. However, these employees were required by defendants to record on their weekly time cards the same fixed number of hours each week; the actual hours worked and pay received each week bearing no relationship to the hours recorded on their time cards. Each of the bakery employees for whom back wages are alleged to be due, testified as to the approximate number of hours they worked each week and wages paid them.

(5) Employee Mary Hall worked six days a week, dividing her workday between the bakery and restaurant. She was instructed by defendants to record only five hours of work each day—two at the bakery and three at the restaurant, which she did. However, her workday was from 6:30 A.M. to 4:30-5:00 P.M., six days a week. At least once a month she worked on to 10:00 or 11:00 P.M. when defendants were catering a party, etc. She was paid $46.00 weekly, $34.00 by check and $12.00 in cash. On or about January, 1971, the amount she received by check was increased to $42.00. She was paid an additional $1.00 an hour for the night work.

(6) In November, 1971, counsel for plaintiff and defendants reached an agreed settlement of the back wage liability allegedly incurred by defendants to some seventeen employees of their bakery during the two year period from February 21, 1969 to February 21, 1971, as aforesaid. However, it was March, 1972, before defendants, pursuant to said agreement, prepared back wage checks for the individual employees and forwarded same to representatives of plaintiff for delivery to employees. A day or so after employee Mary Hall received her back wage check by United States mail, defendant Jack Zager called her aside at the restaurant and told her to return the back wage check to him "or else." She testified that she interpreted this to mean that she was discharged since she had already cashed the check, put the proceeds in the bank and had no intention of returning the money to Zager. There is no evidence that at any time subsequent to this conversation she was offered her job back. To the contrary, Mrs. Hall testified that when she returned a few days later to pick up her pay check for the last week's work, Zager informed her that he "didn't need her business."

(7) Mrs. Hall filed a claim for unemployment compensation with the Tennessee Department of Employment Security on April 26, 1972. On May 8, 1972, her claim was denied by the agency. From this denial she promptly appealed to the Appeals Tribunal where her claim was also denied. The decision of the Chief Appeals Referee (Defendants' Exhibit A) reflects that Mrs. Hall "testified that she was told by her employer that she must give back the . . . wages which she received through the Wage and Hour Division 'or else'; that she felt that the 'or else' demand on her, followed by her failure to return the money amounted to a discharge." Her claim was denied on the grounds that the employer testified he didn't make any threat in an "or else" manner, or otherwise, and that no other employee receiving back wages was discharged. Although not actually discharged, every employee who received a back wage check from the defendants in March, 1972, and who testified in this action, stated that he or she was asked to return the money and that such request was coupled with a threat to their employment.

(8) Mrs. Hall testified that she found gainful employment in September, 1972, after having been unemployed from the date her employment with defendants terminated, a period of some 21 weeks.

(9) Commencing December 14, 1972, Louise Overton was suffered or permitted by defendants to work five full weeks at the bakery, approximately 67½ hours a week, for which she received no remuneration. During this period of time, she assisted her husband who was recovering from an injury to his arm which made it impossible for him to place trays in the bakery ovens and remove same.

(10) Most of the waitresses at the restaurant establishment worked an 8 hour shift each day, 6 days a week. They were paid $5.00 to $6.00 a day, plus any tips they received from customers. Others worked from approximately 3½ to 6 hours a day for a wage of $4.00 to $5.00, plus tips.

(11) Two cooks at the restaurant establishment worked schedules ranging from 5½ to 8 hours a day, 6 days a week. Their weekly wages when divided by hours worked failed to yield the then applicable minimum wage ($1.45 from February 1, 1970 to February 1, 1971, and $1.60 an hour thereafter).

(12) Full time restaurant employees (waitresses and cooks) were furnished one meal a day. Defendant Arnold Zager estimated, while testifying, that defendants' cost of each meal was 55 cents to 60 cents for 1970 and 1971; 65 cents for 1972 and 1973; and $1.10 to $1.15 for 1974. However, defendants failed to make, keep or maintain any records substantiating the cost of furnishing said meals to employees. Employees were not allowed to eat certain seasonal foods as a part of their meal. If they did not eat a meal or ate less than the maximum menu price allowed, they simply lost this benefit.

(13) Compliance Officer Paul Lindsey of the Employment Standards Administration, U. S. Department of Labor, testified that he checked with several restaurants which operated in a fashion similar to defendants and determined that their weighted average cost per meal furnished to employees was 52 cents.

(14) Waitresses recorded tips received each week on a report and turned it in to defendants' office at the end of each week. These amounts were accepted by defendants and claimed as tip credit and entered on their payroll records as part of the employees' total weekly wages. The payroll records were admitted in evidence as part of plaintiff's collective Exhibits Nos. 1 and 2.

(15) The testimony was conflicting with respect to tips received by the waitresses. Defendant Arnold Zager testified that he knew the waitresses were receiving more tips than they were reporting. However, defendants made no determination of the amount of tips received by the waitresses nor did they at any time inform any waitress of the amount of tip credit they were taking per hour. No witness was able to aid the court with documentary evidence of tips received by any waitress greater than those reported by the waitresses to defendants each week, as aforesaid.

(16) A number of witnesses who patronized the defendants' business testified as to the usual tips given by them and their associates. They also testified as to their observations of the "tip practice" of other patrons. The court accepts this testimony as true insofar as it relates to the limited scope of the observations of the witnesses.

A number of the waitresses testified that they did not receive tips amounting to $20.00 per month. Based on lack of credibility, this negative testimony is rejected by the court.

This leaves the court faced with the determination of whether or not the defendants produced any credible objective evidence that the waitresses in question "customarily and regularly" received tips in excess of $20.00 per month. The court concludes that defendants did not produce such evidence.

(17) Defendants testified that most of their restaurant employee time cards were lost when the restaurant establishment was moved to a new location in January, 1973. However, in response to the order of the court entered July 23, 1973, defendants produced a few time cards for some of the restaurant employees during scattered weeks from January, 1973 to July, 1973.

(18) Seventeen employees of the bakery and restaurant testified as to the hours they normally averaged working each week

during various periods of time they were employed. In addition, based on records produced by defendants, as aforesaid, seven additional waitresses are due back wages during some weeks of the brief periods of time they were employed.

(19) Grant Stevenson was employed as a baker and cake decorator and spent all his working hours performing such manual work. He testified that he fired one employee who worked with him because this person was frequently tardy, resulting in the bakery truck getting out late, for which defendants docked his (Stevenson's) weekly salary. This person was rehired by defendant Jack Zager. Stevenson had no responsibility for setting any employee's wages or conditions of employment.

Conclusions of Law

(1) Compensation paid by defendants to their bakery employees constituted straight weekly wages or salary which did not include overtime compensation for hours worked in excess of 40 a week. **Overnight Motor Transp. Co. v. Missel,** 316 U.S. 572; **Hodgson v. Barge, Waggoner and Sumner, Inc.,** 71 Labor Cases, ¶ 32,901, aff'd sub nom **Hodgson v. Barge, Waggoner, Sumner and Cannon,** 477 F.2d 598 (6th Cir. 1973); **Nunn's Battery & Electric Co. v. Goldberg,** 298 F.2d 516 (5th Cir. 1962); **Wirtz v. Flame Coal Co.,** 321 F.2d 558 (6th Cir. 1963); **Hodgson v. Elm Hill Meats of Ky., Inc.,** 327 F.Supp. 1009 (E.D. Ky. 1971), aff'd 463 F.2d 1186 (6th Cir. 1972).

(2) An employer may credit himself with the reasonable costs of meals furnished as a part of the employees' wages (29 U.S.C. § 203(m)). "Reasonable cost" as used in the Act has been determined by the Secretary of Labor to be not more than the actual cost of the meal (29 C.F.R. § 531.3(a)), and

the court so concludes. See **Hodgson v. Frisch Dixie, Inc.,** 66 the Labor Cases, ¶ 32,557, aff'd. 469 F.2d 82 (6th Cir. 1972).

(3) There has been no official determination by the Wage and Hour Division of the reasonable cost to defendants of furnishing their restaurant employees with a meal and the court clearly cannot accept defendant Arnold Zager's completely unsubstantiated estimate of the cost, defendants having failed to comply with the recordkeeping provisions of the Act. See 29 C.F.R. §§ 516.27, 531.1-4, 531.32, 531.33; **Bingham v. Airport Limousine Service,** 314 F.Supp. 565 (W.D. Ark. 1970).

(4) The court finds and concludes that the best evidence available as to the "reasonable cost" to defendants of meals furnished to their employees was presented by Compliance Officer Lindsey who testified that he made an independent investigation and determination of the cost to other comparable restaurateur's operating in a similar fashion to and in the vicinity of defendants' restaurant. The weighted average cost was determined to be 52 cents and the court finds and concludes this amount to be defendants' average cost of meals provided to employees.

(5) A "tipped employee" means any employee engaged in an occupation in which he or she customarily and regularly receives more than $20 a month in tips (29 U.S.C. § 203(t)). Any waitress who did not customarily and regularly receive more than $20 a month in tips does not qualify as a "tipped employee."

(6) An employer who claims tip credit is required to make a regular determination of the amount of such credit and report to the affected employees in writing each time the amount claimed is changed from the amount per hour taken in the preceding week. See 29 C.F.R. § 516.28; **Bingham v. Airport Limousine Service,** *supra*, cited with approval by both the

House and Senate Committees during consideration of the Fair Labor Standards Amendments of 1974;[2] **Brennan v. Ledet,** 73 Labor Cases, ¶ 33053. This the defendants failed to do. Even if defendants "did not anticipate the need of accurate record-keeping, . . . the penalty for such an omission must fall upon the employer and not upon his employee." **Bingham v. Airport Limousine Service,** *supra*, at 572; **Brennan v. Ledet,** *supra*. See also **Anderson v. Mt. Clemens Pottery Co.,** 328 U.S. 680; **Wirtz v. McClure,** 333 F.2d 45 (10th Cir. 1964); **Mitchell v. Riley,** 296 F.2d 614 (5th Cir. 1969); **Hodgson v. Elm Hill Meats**

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[2] Prior to 5-1-74, § 3(m) of the Act provided:

> . . . In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that in the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount.

The aforesaid amendments, which became effective 5-1-74, amended § 3(m) by deletion of the following language:

> . . . except that in the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, . . .

Senate Report 93-690, p. 43 provides:

> The deletion of this language is to make clear the original intent of Congress to place on the employer the burden of proving the amount of tips received by tipped employees and the amount of tip credit, if any, which such employer is entitled to claim as to tipped employees. See **Bingham v. Airport Limousine Service,** 314 F.Supp. 565 (W.D. Ark., 1970), in which the court refused to speculate as to sums the employees might have received in tips when the employer failed to present "any objective information" on the subject.

of Ky., Inc., *supra*; see also Congressional Record—Senate (S 3033, 3-7-74 and S 4695, 3-28-74).[3]

(7) In the absence of any objective proof by defendants that tips actually received by the waitresses customarily and regularly exceeded $20 a month, the court concludes that they are not tipped employees within the meaning of the Act and defendants are entitled to no tip credit.

(8) The court finds and concludes that former employee Mary Hall was unlawfully discharged from her employment with defendants in violation of § 15(a)(3) of the Act and that she is entitled to be made whole for wages lost because of the discriminatory discharge. Since her weekly wages failed to yield the minimum wage for the total hours worked, she is entitled to back wages at the then applicable minimum wage of $1.60 for each hour based on a 61½ hour workweek, plus overtime compensation at the rate of an additional 80 cents per hour for hours she normally worked in excess of 40, from April 3, 1972, to September, 1972, less six weeks during this period, because of the discriminatory discharge. See **Mitchell v. Demario Jewelry, Inc.,** 361 U.S. 288 (1960); **Goldberg v. Bama Manufacturing Corp.,** 302 F.2d 152 (5th Cir. 1962). This is in

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[3] Senator Harrison Williams, Committee Chairman, stated (on the Senate Floor):

> . . . Another question has been raised concerning the Amendments to the "tip credit" language of section 3(m). As noted in the committee report, and as I have stated, the intent of this provision is to make clear where the burden of proof rests in legal proceedings. Under current law, the employee, who can ill afford legal representation has erroneously been required by one court to meet the burden of proving to the court's satisfaction that the amount of tips he or she actually received was less than the amount claimed by the employer as a tip credit.
>
> **Shultz v. William Lee** (sic) **Hotel Company, Inc.,** 304 F.Supp. 427 (W.D. Tenn., 1969). Under this provision the burden is clearly on the employer to provide to a court's satisfaction that the amount of tip credit claimed by such employer was actually received as tips by the employee . . . (S 3033).

addition to back wages due her for the period February 22, 1971, to the time of her discharge, during which period she was paid subminimum wages and no overtime compensation.

(9) The court finds and concludes that defendants suffered or permitted Louise Overton to work at the bakery during the period of time specified in Findings of Fact No. 9 above. She is entitled to compensation at the rate of $1.60 per hour, the then applicable minimum wage, for 67½ hours a week during the five week period worked and to overtime compensation at the rate of an additional 80 cents an hour for the 27½ hours she worked in excess of 40 a week.

(10) Violations of the Fair Labor Standards Act are willful, and therefore, subject an employer to the three-year liability provisions of the Portal-to-Portal Act of 1947 (29 U.S.C. § 255), if he knows, or has reason to know, that his conduct is governed by the Act. It is not necessary to show that the employer proceeded with knowledge that his actions were contrary to the requirements of the Act. **Coleman v. Jiffy June Farms, Inc.,** 458 F.2d 1139 (5th Cir. 1972), **cert. den.,** 409 U.S. 948; **Brennan v. Heard,** 491 F.2d 1 (5th Cir. 1974).

(11) Defendants have willfully violated §§ 6, 7, and 15 (a)(2) of the Act by paying to many of their employees wages at less than the then current minimum wage and by their failure to pay overtime compensation to many of their employees for hours worked in excess of 40 a week.

(12) The court finds and concludes that the rstaurant employees paid in violation of the monetary provisions of the Act are due back wages for work during the period since April 12, 1970, and that the bakery employees are due back wages for work during the period since February 22, 1971. See 29 U.S.C. § 255, as amended September 23, 1966.

(13) Defendants have willfully violated §§ 11(c) and 15 (a)(5) of the Act and regulations promulgated pursuant to the

authority contained in § 11(c), by their failure and refusal to make, keep and preserve adequate and accurate records of the wages, hours and other conditions and practices of employment maintained by them as set out in said regulations (29 C.F.R. §§ 516.2, 516.5, 516.27, and 516.28).

(14) Defendants have willfully violated § 15(a)(3) of the Act in that they have discharged or in other manners have discriminated against employees because such employees filed complaints or caused to be instituted proceedings under or related to the Act or testified or were about to testify in such proceedings.

(15) Employee Grant Stevenson was not employed in a bona fide executive, administrative or professional capacity within the meaning of § 13(a)(1) of the Act (29 U.S.C. § 213 (a)(1)). See 29 C.F.R. §§ 541.1, 541.2, and 541.3.

(16) The plaintiff has proved that the employees have performed work for which they were improperly compensated and has produced sufficient evidence for the court to find the amount and extent of that work as a matter of just and reasonable inference and the defendants have failed to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonable inference to be drawn from plaintiff's evidence. **Anderson v. Mt. Clemens Pottery Co.,** *supra*; **Shultz v. Tarheel Coals, Inc.,** 417 F.2d 583 (6th Cir. 1969); **Wirtz v. Elm Hill Meats of Ky., Inc.,** *supra*.

(17) Upon the basis of the entire record herein, plaintiff is entitled to a judgment permanently enjoining defendants from further violations of the Act and restraining defendants from continuing to withhold payment of wages due their employees in an amount to be computed by the plaintiff, with interest at the rate of 6% per annum, in conformity with this Memorandum.

Plaintiff shall prepare an order in conformity with this Memorandum. Such order shall be submitted to this court within fifteen (15) days from the date of this Memorandum.

/s/ L. CLURE MORTON
United States District Judge

United States District Court
For the Middle District of Tennessee
Nashville Division

Peter J. Brennan, Secretary of Labor, United States Department of Labor, Plaintiff, v. Arnold Zager, Jack Zager and Morris Zager, Individually and as Co-Partners, Doing Business as Morris Zager Bakery, Morris Zager Delicacies and Zager All Food Service, Defendants.	Civil Action. File No. 6973.

JUDGMENT

(Entered April 1, 1975)

This cause having come on for trial before the Court sitting without a jury at Nashville, Tennessee, on June 5, 6 and 7, 1974, the plaintiff and defendants appearing by counsel, trial having been had upon the issues, and the Court's findings of fact and conclusions of law and order having been duly entered herein on March 12, 1975,

Now, Therefore, upon the said findings of fact and conclusions of law and order, and sufficient reasons therefor appearing, it is hereby

Ordered, Adjudged and Decreed that the defendants, Arnold Zager and Jack Zager, individually and as co-partners, doing business at Morris Zager Bakery, Morris Zager Delicacies and Zager All Food Service, their agents, servants, employees and all persons in active concert or participation with them be, and they hereby are, permanently enjoined and restrained from violating the provisions of sections 15(a)(2), 15(a)(3) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, *et seq.*), hereinafter referred to as the Act, in any of the following manners:

(1) The defendants shall not, contrary to sections 6 and 15(a)(2) of the Act, pay to any of their employees who are engaged in commerce, in the production of goods for commerce or employed in an enterprise engaged in commerce or in the production of goods for commerce, as such terms are defined in the Act, wages at a rate less than $2.10 an hour during the period prior to December 31, 1975 and $2.30 an hour thereafter, the minimum rates required by the Act (or such other minimum hourly rate as may hereafter be made applicable by any amendment of the Act).

(2) The defendants shall not, contrary to sections 7 and 15(a)(2) of the Act, employ any of their employees engaged in commerce, in the production of goods for commerce or in an enterprise engaged in commerce or in the production of goods for commerce, as such terms are defined in the Act, for a workweek longer than 40 hours unless such employee receives compensation for his employment in excess of 40 hours in each such workweek at a rate not less than one and one-half times the regular rate at which he is employed.

(3) The defendants shall not fail to make, keep and preserve records of their employees and of the wages, hours and other

conditions and practices of employment maintained by them as prescribed by the regulations issued, and from time to time amended, pursuant to section 11(c) of the Act and found in Title 29, Chapter V, Code of Federal Regulations, Part 516, including but not limited to records showing adequately and accurately:

(a) Employees' names and addresses;

(b) Dates of birth, if under 19;

(c) Regular hourly rate of pay;

(d) Hours worked each workday and total hours worked each workweek;

(e) Total daily or weekly straight time earnings or wages;

(f) Total overtime excess compensation for the workweek;

(g) Total wages paid each pay period;

(h) Date of payment and the paid period covered by payment;

and for tipped employees, the following additional records:

(i) A symbol or letter placed on the pay records identifying each employee whose wage is determined in part by tips.

(j) The weekly or monthly amount reported by the employee, to the employer, of tips received.

(k) Amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer. The amount per hour which the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week.

(l) Hours worked each workday in any occupation in which the employee does not receive tips, and total daily or weekly straight-time payment made by the defendants for such hours.

(m) Hours worked each workday in occupations in which the employee receives tips and total daily or weekly straight-time earnings for such hours.

(4) Defendants shall not fail to make their records available for inspection and transcription by duly authorized representatives of the administrator of the Employment Standards Administration, U. S. Department of Labor, pursuant to the authority of section 11(a) of the Act.

(5) The defendants shall not discharge, threaten to discharge or otherwise discriminate against any of their employees because the employee has filed a complaint or caused to be instituted a proceeding under or related to the Act, or has testified or is about to testify in such proceedings, and it is further

Ordered that the defendants shall not continue to withhold payment of minimum wages and overtime compensation found by the Court to be due under the Act to the following employees with interest thereon at 6% per annum from the median date of withholding from each person until payment, and in the amounts shown with respect to each:

Name	Back Wages	Interest	Total Due
Stella Allen	1,821.15	140.96	$ 1,962.11
Mary L. Bratcher	335.85	46.34	382.19
Nina Dyehouse Brooks	4,225.86	507.10	4,732.96
Grace Cunningham	94.00	10.95	104.95
Danise Glass	41.80	5.01	46.81
Mary Hall	6,800.16	1,346.43	8,146.59
Lillian Hastings	51.67	10.54	62.21
Eugenia B. Helguera	77.76	15.40	93.16
Wanda Marie Henley	403.55	55.68	459.23
Gladys E. Hobbs	411.06	47.84	458.90
Patricia Hodge	52.88	11.10	63.98
Teresa Jones	81.89	9.23	91.12
Judy	31.68	3.99	35.67
Mike Kemp	163.89	29.50	193.39
Beth Cunningham King	1,250.59	202.59	1,453.18
Nathan Mayberry	1,479.64	168.66	1,648.30
Joe Overton	6,029.35	868.22	6,897.57
Lousie Overton	530.00	69.64	599.64
Harrietta Patterson	404.03	55.22	459.25
Grant Stevenson	2,839.16	664.37	3,503.53
Floyd Woodley	964.04	144.60	1,108.64
		Total	$32,503.38

Defendants shall deliver to plaintiff's attorneys in Nashville, Tennessee, a cashier's or certified check in the amount of $32,503.39, payable to "Wage-Hour, Labor", within 30 days after entry of this judgment, with a list containing the name and last known address of each employee, his or her social security number, and the amount of legal deductions for social security and Federal withholding taxes to be withheld by plaintiff from the back wages due each employee, and it is further

Ordered that plaintiff shall distribute the proceeds of said check to the employees or to their legal representatives as their interests appear, after making appropriate legal deductions, and any such sums not paid out by the plaintiff within one year (either because of inability of either defendants or plaintiff to locate the person to whom the money is due or his legal representative or because of such person's refusal to accept such payment) shall be deposited with the Clerk of this Court, who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. 2041 (1964), and it is further

Ordered that the legally taxable costs and disbursements incurred in this action be paid by the defendants for which execution shall issue upon application therefor.

Enter

/s/ L. CLURE MORTON
United States District Judge

APPENDIX B

Opinion of the United States Court of Appeals for the Sixth Circuit

No. 75-1658

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN T. DUNLOP,
Secretary of Labor,
U. S. Department of Labor,
Plaintiff-Appellee,

v.

ARNOLD ZAGER,
JACK ZAGER, et al.,
Defendants-Appellants.

ORDER

Filed December 23, 1975, John P. Hehman, Clerk

Before: PHILLIPS, Chief Judge, MILLER, Circuit Judge, and MARKEY,* Chief Judge.

This action was instituted in the district court to enjoin the defendants from alleged violations of the Fair Labor Standards Act in violation of 29 U.S.C. Sec. 201 et seq.

The district court, after a full hearing, granted the relief requested and the defendants appealed. A number of issues are raised on appeal, including the following:

*The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, Washington, D.C. sitting by designation.

(1) Whether defendants' restaurant on Sixth Avenue in Nashville, Tennessee, is an exempt retail establishment, having a sales volume of less than $250,000 annually; on the basis of the entire record indicates that his conclusions of law were correct, and that his findings of fact were not clearly erroneous.

It is therefore ORDERED and ADJUDGED that the judgment of the district court be and the same is hereby affirmed on the basis of its findings of fact and conclusions of law of October 23, 1973 and March 12, 1975.

ENTERED BY ORDER OF THE COURT.

S/John Hehman,

Clerk

Supreme Court, U. S.
FILED
JUL 2 1976
MICHAEL RODAK, JR., CLERK

No. 75-1599

In the Supreme Court of the United States

OCTOBER TERM, 1975

ARNOLD ZAGER, ET AL., PETITIONERS

v.

W. J. USERY, JR., SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
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CARIN ANN CLAUSS,
Associate Solicitor,

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Attorneys,
Department of Labor,
Washington, D.C. 20210.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 42-43) is not reported. The district court's findings of fact and conclusions of law of October 23, 1973 (Pet. App. 15-22), order of November 7, 1973 (Pet. App. 22-23), and memorandum opinion of March 12, 1975 (Pet. App. 24-36) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1975. On March 23, 1976, Mr. Justice Stewart extended the time in which to file a petition for a writ of certiorari to May 3, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the district court correctly concluded that petitioners violated several provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*

STATEMENT

Petitioners own and operate a restaurant-delicatessen, wholesale food distributorship and bakery in Nashville, Tennessee. The various components of the business are closely integrated and are managed and coordinated at a central office. Moreover, the business regularly purchases and receives goods from out-of-state suppliers and purchases and receives from local suppliers a substantial volume of goods that have moved in interstate commerce (Pet. App. 16-17).

In April 1973, the Secretary of Labor brought suit to enjoin petitioners from violating Section 15(a)(2), (3), and (5) of the Fair Labor Standards Act of 1938, 52 Stat. 1068, as amended, 29 U.S.C. 215(a)(2), (3), and (5), and to restrain petitioners from withholding payment of wages due certain of their employees under the Act (Pet. App. 15). After a trial before the United States District Court for the Middle District of Tennessee, petitioners were found to have willfully violated the Act by paying their employees straight weekly wages for hours worked in excess of 40 per week, discharging an employee who asserted her rights under the Act, suffering or permitting a person to work a substantial number of hours without pay, requiring bakery workers to fill out their time cards without regard to the actual number of hours worked, and improperly reducing the earnings of waitresses by the amount of their tips (Pet. App. 24-36). Petitioners were ordered to compensate their employees at no less than the minimum wage for a work week of

40 hours or less and at one and one-half times the regular rate for work in excess of 40 hours, to keep and preserve accurate wage, hour and other records as required by the Act, and to make specified awards of back pay, totaling $32,503.39, to 21 of their employees (Pet. App. 36-41). The court of appeals affirmed (Pet. App. 42-43).

ARGUMENT

Petitioners contend that the district court erred in determining that their business generated a sufficient dollar volume of sales to be subject to the Act and in concluding that the evidence supported the Secretary's charge that they had violated several provisions of the Act. Each of these factual contentions was rejected by the court of appeals, which correctly concluded that the trial court's findings were not clearly erroneous. Rule 52(a), Fed. R. Civ. P. There is no need for further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

1. Petitioners contend (Pet. 5-8) that their restaurant qualified as an exempt retail establishment under Section 13(a)(2) of the Act, 29 U.S.C. 213(a)(2), because its annual dollar volume of sales was less than $250,000. The trial court found, however, that the restaurant-delicatessen and the "food delicacies" distribution business, both of which were operated at the same location, were "highly integrated, both physically and functionally, and comprise a single business establishment with an annual dollar volume of sales in excess of $250,000" (Pet. App. 21-22). This conclusion was correct, since the evidence showed that the several businesses operated by petitioners utilized common management, common purchasing, common operational equipment and facilities, common bank accounts, and, when necessary, common personnel (Pet. App. 16-17). It was therefore proper to consider their

combined sales in determining the applicability of the Act. See, *e.g.*, *Gilreath* v. *Daniel Funeral Home, Inc.*, 421 F. 2d 504, 508-510 (C.A. 8); *Acme Car & Truck Rentals, Inc.* v. *Hooper*, 331 F. 2d 442, 445 (C.A. 5); *Mitchell* v. *Gammill*, 245 F. 2d 207, 211 (C.A. 5). Cf. *Wirtz* v. *Columbian Mutual Life Ins. Co.*, 380 F. 2d 903, 909 (C.A. 6).[1]

2. Petitioners claim (Pet. 8-9) that the district court erred in holding that their restaurant's waitresses did not earn more than $20.00 per month in tips and hence were not "tipped employees" within Section 3(m) and (t) of the Act, 29 U.S.C. 203(m) and (t). But petitioners concede (Pet. 9) that several waitresses testified that they never received more than $20.00 per month in tips, and the trial court was entitled to credit this testimony.

3. Petitioners challenge (Pet. 10-11) the district court's findings that Mary Hall, a bakery and restaurant employee, was discharged for having asserted her rights under the Act. The evidence at trial showed that after petitioners had delivered back pay checks to certain of their employees under a settlement agreement with the Department of Labor, petitioner Jack Zager told Mrs. Hall to return the check "or else" (Pet. App. 26). Mrs. Hall testified that she

[1]Although petitioners suggest (Pet. 6) that the value of goods supplied to the Scottish Rite Temple should not have been included in the restaurant's annual dollar volume because the food was delivered as a "civic duty," the Act defines "sale" to include "any sale, exchange * * * or other disposition" (Section 3(k), 29 U.S.C. 203(k)). Cf. *Wirtz* v. *Allen Green & Associates, Inc.*, 379 F. 2d 198, 200 (C.A. 6). The applicability of the Act's wage standards depends not on the profitability of operations but on their relationship to interstate commerce (*Public Bldg. Authority of Birmingham* v. *Goldberg* 298 F. 2d 367, 370 (C.A. 5)), and "the fact that [accommodation sales] were made without profit did not change their legal aspect; they involved work operations which [the] employees were engaged to perform * * *." *Northwestern-Hanna Fuel Co.* v. *McComb*, 166 F. 2d 932, 937 (C.A. 8).

interpreted this threat to mean that she was discharged since she had already cashed the check, and that when she reported to pick up her last pay check petitioner Zager told her that he "didn't need her business" (Pet. App. 26-27). Moreover, other witnesses testified that petitioner Zager had also asked them to return their money under the settlement and that his demand had been coupled with a threat to their employment (Pet. App. 27). On this record, the trial court reasonably concluded that Mrs. Hall had been improperly discharged, in violation of Section 15(a)(3) of the Act, 29 U.S.C. 215(a)(3), for refusing to return wages to which she was lawfully entitled. See *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F. 2d 179, 181 (C.A. 8).

4. Nor does the record support petitioners' claim (Pet. 11-12) that, although Louise Overton assisted her husband at the bakery for five weeks, they were not aware of her employment. The district court's finding to the contrary was adequately grounded on the testimony of Mrs. Overton and her husband that petitioners knew of her work (A. 164)[2] and had given it their permission (A. 163-164), and that petitioners had at one point discussed paying Mrs. Overton for her services (A. 164, 181-182). See *Burry* v. *National Trailer Convoy, Inc.*, 338 F. 2d 422, 426 (C.A. 6); *Wirtz* v. *Leonard*, 317 F. 2d 768, 769 (C.A. 5). In any event, apart from this proof of petitioners' direct knowledge of Mrs. Overton's presence as an employee in the plant, the court properly concluded that petitioners had "suffered or permitted" Mrs. Overton to work for them within the meaning of Section 3(g) of the Act, 29 U.S.C. 203(g). It is sufficient under that section if petitioners could have known of Mrs. Overton's presence

[2]"A." refers to the appendix in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

if they had "inquire[d] into the conditions prevailing in [their] business." *Gulf King Shrimp Co.* v. *Wirtz*, 407 F. 2d 508, 512 (C.A. 5). See also *Lenroot* v. *Interstate Bakeries Corp.*, 146 F. 2d 325, 328 (C.A. 8).[3]

5. The district court's conclusion (Pet. App. 25-26) that petitioners required their bakery employees to record a set number of hours on their time cards without regard to the actual number of hours worked is also supported by the record. Although petitioners seek to reargue the evidence (Pet. 12-13), the court's finding of liability, and of the amounts of the resulting underpayments, was based on the testimony of several employees (A. 177, 190-191, 201-202, 218, 227-228) as well as of the Department's compliance officer (A. 289-294). See Resp. Exh. 5 (A. 436-437). See also *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688; *Hodgson* v. *American Concrete Construction Co., Inc.*, 471 F. 2d 1183, 1185-1186 (C.A. 6).

6. Petitioners allege (Pet. 13-14) that the actual value of the meals provided to their employees exceeds the $0.52 allowed by the district court under Section 3(m) of the Act, 29 U.S.C. 203(m). But since petitioners did not maintain the records of cost required by the applicable regulations (29 C.F.R. 531.28), did not request a determination of fair value by the Secretary pursuant to Section 3(m), and did not adduce objective evidence to substantiate their estimate of cost, the court was justified in accepting the testimony of the Department's compliance officer, who

[3] *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, is not to the contrary. The Court there held that Section 3(g) of the Act did not apply to an employer who provided free instruction to trainees, even though they would later be eligible for hiring as employees. Unlike the employer in that case, who received "no 'immediate advantage' from any work done by the trainees," *id.* at 153, petitioners were directly benefited by Mrs. Overton's services.

stated that his investigation of comparable restaurants showed an average cost of 52 cents per meal (Pet. App. 31).

7. Finally, petitioners challenge (Pet. 14) the trial court's determination that their violations of the Act were willful. Their present assertion of innocence, however, is incompatible with the findings that petitioners directed their employees to understate their working time on the records used for computing wages and threatened to discharge employees who refused to return back pay under a settlement agreement with the Secretary. See pp. 4-5, 6, *supra*.

Moreover, it is immaterial whether an employer knows that his actions are prohibited by the Act. It is sufficient if he is aware that the Act applies to him and if he makes no effort to ascertain his obligations under its provisions. See *Brennan* v. *Air Terminal Parking of Columbia, Inc.*, 498 F. 2d 1397 (C.A. 4), affirming 72 CCH Lab. Cas. para. 32,979 (D. S.C., October 15, 1973); *Brennan* v. *Heard*, 491 F. 2d 1, 3 (C.A. 5); *Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139, 1142 (C.A. 5), certiorari denied, 409 U.S. 948. Here, petitioners knew that the Act applied to their operations, having already been required to award back pay to their employees under a settlement following a previous investigation by the Secretary (Pet. App. 25). Although petitioners contend that they relied on the compliance officer's determination in that investigation that the restaurant-delicatessen operations were exempt (Pet. 14), that determination, as the trial court found, was an error resulting from petitioners' failure to provide information that they had a duty to disclose (Pet. App. 24-25).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

JACOB I. KARRO,
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JULY 1976.

DOJ-1976-07